IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

FIRST APPEAL NO.643 OF 2004

Binay Bahadur Srivastava,
30A Khotachiwadi, Girgaon,
Mumbai-400 004. ....Appellant.

Vs.

1. Municipal Corporation of Greater Bombay.

2. Dy. Municipal Commissioner,
Zone-1, E Ward Bldg., Byculla, Bombay.

3. Ward Officer, D Ward, Bombay-400007.
....Respondents.

Mr. B.B. Srivastava for the Appellant.
Mr. J.J.Xavier for the Respondents.

CORAM: R.S. MOHITE,J.
DATED : 10/8/2005.

ORAL JUDGMENT :

1. This is an appeal filed by the original plaintiff impunging Judgment and order dated 31./3.2004 passed by the Judge of the Civil Court in L.C. Suit No.2550 of 12997, by which he dismissed the plaintiff’s suit.

2. The brief facts of the plaintiff’s suit are as follows:

The plaintiff is the owner of the building known as Srivastava building situated at 30A, Khotachiwadi, Girgaon, Bombay 400 004. On 7.12.1996, Bombay Municipal Corporation issued a notice alleging unauthorised construction as mentioned in the said notice. The schedule of the notice mentioned the following contraventions:

> "Unauthorisedly raising the compound wall and covering the open space in front of the building with wooden beams and ladi coba as shown in the sketch overleaf".

The sketch behind the notice indicated the nature of alleged violation.

3. On 7.1.1997, the plaintiff sent reply addressd to the Dy. Municipal Commissioner, Zone-1. The crux of the reply was that the covering of the open space was not unauthorised and the same was covered under the plan approved by Executive Engineer under EB/3731/A of 1981. On 11.3.1997 the Dy. Municipal Commissioner (Zone-1) on the basis of the record before him passed an order stating that the plaintiff has not produced any documentary evidence

alongwith his aforesaid reply dated 7.1.1997 to prove authorisation of the work under reference or existence of construction prior to 17.4.1964. He therefore, passed an order directing the plaintiff to remove the unauthorised construction within 15 days from the receipt of the notice.

4. On 15.3.1997 the plaintiff made a representation to the Dy. Municipal Commissioner (Zone-1) requesting him to withdraw the notice under Section-351 of the Act. However, on 13.4.1997, a notice under section 488 of the B.M.C. Act came to be served on the plaintiff. The plaintiff filed the present suit on 4.5.1997. In the said suit challenge was to the notice under section 488 and under Section 351 of the B.M.C.Act. and the declaration was sought that the notice under Section 488 and that notice under Section 351 be declared null and void and set aside. Second main prayer in this suit was for permanent injunction restraining the defendant No.1, their agents and servants from enforcing the notice dated 30.4.1997 under Section 488 of the Act.

5. On behalf of the respondents written statement came to be filed in the suit, in which, it was

stated that as a complaint had been received officers of the defendants visited the premises and detected the construction which was in progress on 13.6.1996. In the circumstances, notice under Section 354A dated 20.10.1996 was served upon the plaintiff and this was received by the plaintiff on 30.10.1996. This notice was served for unauthorised raising of the compound wall and covering of open space with wooden beams and ladi coba. That, by the said notice the plaintiff was directed to stop the construction and -produce the documentary evidence as well as the permission taken by him from the defendants. The plaintiff failed and neglected to comply with the directions given in the said notice and completed the work and therefore, proceedings under Section 351 were taken against the plaintiff. It was denied that the said work was authorised.

6. At the time of trial, the plaintiff led his own evidence to prove his case. During the cross examination, the plaintiff admitted that height of the compound wall was presently about 7.10ft. to 8ft. roughly. The area of the open space was roughly 125sq.ft. There is ladi coba flooring and roof is of wooden joist with ladi coba. At one end joist is resting on the beam and on the other end

resting on the wooden sleeper fixed on the compound wall. Initially it was open to sky and it was covered in the year 1992 or 1993. He stated that he has taken permission from the defendants/Corporation for covering the open space. He stated that he did not have sanctioned plan and therefore, he had not filed the same in the proceeding. Earlier, in the examination in chief he has produced documents and amongst such documents, the document at Exh.11 was a repair plan of MHADA.

7. After the plaintiff's evidence was over. On behalf of the defendants Jr. Engineer Mr.Sanjay Pandit was examined. He supported the case of the defendants. Her stated that he has visited the premises on 29.10.1996 and had observed the construction of raising of the beams and wall and covering the open space. That, on 20.11.1996 when he visited the premises, he found that the work was completed and open space in front of the house was covered by ladi coba and wooden rafters. He prepared the inspection report (Exh.20) and thereafter, 351 proceedings were initiated. In his cross examination, he was confronted with the was not aware whether there was any order passed by any officer of the B.M.C.as regards any sanction or

revision of the plan. Upon being called upon, this witness produced a zerox copy of the sanctioned plan which was taken on record and marked Exh.21. He denied that when he visited the site original sanction plan was sought to be shown to him. He stated that he was not aware whether sanction plan was shown by the plaintiff's representative to Ward Officer or Asstt. Engineer (B & P).

8. Upon such oral and documentary evidence, the Trial Court dismissed the plaintiff's suit. I have perused the entire record. I do also called for the original of Exh.21 since Exh.21 was a very faint document and since the original had been seen by Court and returned after comparison. As far as the plaintiff is concerned, he has not produced the original sanction plan or even a copy thereof. The contention of the plaintiff is that the construction was admittedly effected was authorised and as per the sanctioned plan is therefore, not been substantiated by the documents produced by him. Exh.11, which is a true copy of the plan for repairs of the suit building, contains a note as follows:

> "Certified that the provision for repair shown in the drawing are only tentative

based on visual inspection and assumption. Extent to repairs are likely to change during execution as per the decision of the board".

There is no date on this plan. The Advocate for the plaintiff on being asked pointed out that the repairs were carried out in 1992.93. It is therefore, quite possible that this plan include of the unauthorised construction. In any case, this plan was for the purpose of repairs by Repair Board and therefore, this would have no relevance and therefore, strictly would have no relevance for deciding whether the construction authorised or not.

9. In reply to show cause notice, categorical assertion of the plaintiff was that the construction was according to the sanctioned plan. I find that Exh.21 is therefore, the only document which was produced being a copy of the sanctioned plan. Reliance was placed by the plaintiff on Exh.21 and in particular on Section AA to show that he had authority to cover the open space between his beams and the wall. On perusal of the original plan, I find that there is no such protruding covered structure in Section AA in the original. In fact,

on perusal of the file, it is clear that the approval was not in respect of the construction but in respect of W.C. on the first floor. The original sanctioned plan has not been produced on record at all. In fact, from the reply to Section 351 notice, it is not the plaintiff's case that unauthorised construction was as per any approval granted prior to 1981. The burden was upon the plaintiff prove his case that his construction was as [per approved plan. He could have summoned the sanctioned plan. But he failed to do so. In the circumstances, I find that there is no fault in the reasoning of the lower court or in the conclusion arrived at by the Trial Court. The appeal therefore, must fail and the same is dismissed. In the circumstances, there is no order as to costs.

10. The Advocate for the appellant seeks an extension of stay for a reasonable period on the ground that the monsoon is on going. It is directed that the offending structure may not be demolished for a period of 30 days from today.

(R.S. MOHITE, J.)